84-1349

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN MARIETTA, a Maryland Corporation,
Respondent,

versus

JERRY T. BUSTO
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

JERRY T. BUSTO
790 Depew Street
Lakewood, Colorado 80214
(303) 237-1062 or 237-9373
Petitioner, Pro-se

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Jefferson County District Court of the State of Colorado violated Rule 97 (Colorado Rules of Civil Procedure) and the due process clause of the Fifth and the Fourteenth Amendments to the United States Constitution by not holding a hearing on the Motion For a Change of Judge which was filed in a timely manner by the Petitioner.

2. Whether the Jefferson County District Court further violated the Petitioner's right to due process of law under the Fifth and the Fourteenth Amendments to the United States Constitution by making a decision on an issue regarding patents that is within the jurisdiction of a special federal court.

3. Whether the Colorado Court of Appeals violated the Petitioner's right to due process of law under the Fifth and the Fourteenth Amendments to the United States Constitution by finding that the Petitioner's Appeal was frivolous, thus granting double costs against the Petitioner.

LIST OF INTERESTED PARTIES

Jerry T. Busto, Petitioner, Pro-se, certifies that the following listed parties have an interest in the outcome of this case. These representations are in order that the Justices of the Court may evaluate possible disqualifications or recusal.

1. Martin Marietta, a Maryland Corporation, represented by John R. Webb, of Holmes Roberts & Owen, 1700 Broadway, Suite 1800, Denver, Colorado 80290.

2. Jerry T. Busto, Petitioner, Pro-se, 790 Depew Street, Lakewood, Colorado 80214.

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN MARIETTA, a Maryland Corporation
Respondent,

versus

JERRY T. BUSTO
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals of the State of Colorado affirming the Jefferson County District Court's judgment against the Petitioner appears at APPENDIX "A" and is reported at —P.2d— Slip Opinion Number 82CA092 (Colorado Court of Appeals, April 26, 1984). The Order of the Colorado Court of Appeals denying a Petition For Rehearing appears in APPENDIX "B". The order of the Colorado Supreme Court denying a Petition For a Writ of Certiorari appears in APPENDIX "C". A copy of Petitioner's Request For Assignment of Case to a Different Judge appears in APPENDIX "D". Selected portions of the Reporter's Transcript of the trial in the Jefferson County District Court appear in APPENDIX "E".

JURISDICTION

The Opinion and Judgment of the Court of Appeals of the State of Colorado affirming the Jefferson County District Court's judgment against Petitioner appears at APPENDIX "A" and is reported at —P.2d— Slip Opinion Number 82CA092 (Colorado Court of Appeals April 26, 1984). The order of the Colorado Court of Appeals denying a Petition For Rehearing appears in APPENDIX "B". The Order of the Colorado Supreme Court denying a Petition For a Writ of Certiorari appears in APPENDIX "C". This Petition For a Writ of Certiorari is being filed within ninety days of the Colorado Supreme Court's denial of the Petitioner's Petition For a Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Rule 97 of the Colorado Rules of Civil Procedure

Rule 97. Change of Judge
General Consideration
Filing of motion to disqualify a trial judge, etc.

A motion to disqualify the judge has the effect, as a matter of law, of suspending any further proceedings until the Judge rules on the motion to disqualify. City of Trinidad v. District Court, 196 Colo. 106,581 P.2d 304 (1978).

2. Fifth Amendment to the Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Fourteenth Amendment to the Constitution of the United States

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

The Plaintiff-Appellee, MARTIN MARIETTA CORP., hereinafter referred to as "Martin" filed an action on December 11, 1980, in the District Court of Jefferson County, State of Colorado for a Preliminary and Permanent Injunction against the Defendant-Appellant, Jerry T. Busto, hereinafter referred to as "Busto" prohibiting him from divulging any information concerning a trade secret to which Martin claimed exclusive rights and ownership. Various pre-trial motions and hearings were held. One hearing allowed Martin to apply for a Patent on the above mentioned trade secret to which Martin claimed exclusive rights and ownership. On June 30, 1982, Busto filed a Motion for Change of Judge accompanied by affidavit challenging certain bias on the part of the trial judge, Honorable Gaspar Perricone, to which Busto had become aware of.

No hearing was ever held on the Motion for change of Judge and the record is totally void of any ruling having been made or entered on said Motion including even a minute order. The matter proceeded to trial on July 6, 1982. When Busto appeared at trial pro-se, the Honorable Joseph Lilly was presiding. Once again the record is totally void of why Judge Perricone was not presiding or how Judge Lilly came to preside over the matter; Judge Lilly having been a retired judge of the Denver District Court. The only reference found regarding the matter is in Martin's Preliminary Statement filed with the Court of Appeals, under Issues to be Raised on Appeal Sub-Paragraph (a) "Judge Perricone transferred the case to Judge Lilly for Trial".

The record was never supplemented regarding any ruling by the trial Court on Busto's Motion for Change of Judge or on the selection process of Judge Lilly even though Martin knew these matters were at issue from Busto's Preliminary Statement. The record however, was supplemented once by Martin's counsel pursuant to C.A.R. 10(c) a hearing on continuance which was not of record. Appeal Briefs were filed by both parties.

An opinion was rendered by the Court of Appeals on April 26, 1984, wherein the Court affirmed the trial court and held that error, if any committed by the trial judge regarding Busto's Motion for Disqualification was technical in nature and rendered harmless when Judge Perricone disqualified himself and Judge Lilly was appointed. The Court went on to hold the appeal frivolous on the grounds that the Court from review of the record, argument of counsel, and its own research, felt that Busto was unable to present any rational arguments based on evidence or law in support of his claims of error. Double costs were awarded Martin and the matter was remanded to the trial court for determination of C.A.R. 38(d) damages including reasonable attorney's fees. A Petition for Rehearing was filed with the Court of Appeals on May 9, 1984. An Order denying the Petition for Rehearing was entered on June 7, 1984. Petition for a Writ of Certiorari to the Colorado Supreme Court was filed on July 9, 1984. On November 26, 1984 an Order denying the Petition For a Writ of Certiorari was entered.

REASONS FOR GRANTING WRIT OF CERTIORARI

BY NOT HOLDING A HEARING ON THE MOTION FOR A CHANGE OF JUDGE WHICH WAS FILED IN A TIMELY MANNER BY THE PETITIONER, THE JEFFERSON COUNTY DISTRICT COURT OF THE STATE OF COLORADO VIOLATED RULE 97 (COLORADO RULES OF CIVIL PROCEDURE) AND THE DUE PROCESS CLAUSE OF THE FIFTH AND THE FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE JEFFERSON COUNTY COURT FURTHER VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY MAKING A DECISION REGARDING PATENTS THAT IS WITHIN THE JURISDICTION OF A SPECIAL FEDERAL COURT.

BY FINDING THAT THE PETITIONER'S APPEAL WAS FRIVOLOUS, THUS GRANTING DOUBLE COSTS AGAINST THE PETITIONER, THE COLORADO COURT OF APPEALS VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND THE FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Petition presents an important question of first impression concerning the construction of C.R.C.P. 97 as promulgated by the Colorado Supreme Court and the due process clauses of the 5th and 14th amendments to the United States Constitution.

1. On numerous prior occasions the Colorado Supreme Court has been called upon to interpret and give enforcement to the language of C.R.C.P. 97.

The court has clearly held that the requisite of C.R.C.P. 97 are of jurisdictional magnitude. Thus, when a trial court fails to abide by the requisites of Rule 97 it loses jurisdiction of the case and any action or judgment entered thereafter is void. Leone Co. v. District Court, 150 Colo. 47, 48 (1962); Brower v. District Court of First Judicial District, 455 P.2d 207 (Colo. 1969); City of Trinidad v. District Court, etc., 581 P.2d 304 (Colo. 1978); V.T.A., Inc. v. Airco, Inc., 597 F.2d 220 (10th Cir. 1979); In re Marriage of Stroud, 631 P.2d 168 (Colo. 1981). Rule 97 has further been interpreted so as not to require a hearing on a motion thereto. See, Brower Supra. The language of Rule 97 is clear, it mandates a trial court to make a ruling on a motion for disqualification or the Court loses jurisdiction until it does. The Court has held such a mandate does exist in Rule 97 and a Writ of Mandamus may lie as a remedy to compel compliance by the trial court of its duty to make a ruling. See, City of Trinidad Supra; Walker v. People, 248 P.2d 287, 293 (Colo. 1952).

The question which arises in the factual context of this case is unique to all other reported cases concerning Rule 97. In its basic context it can be stated as "what constitutes a ruling for Rule 97 purposes or can a ruling be implied from a silent record". It is the Appellant's contention, that a ruling concerning a Rule 97 disqualification motion must affirmatively appear of record. A ruling as required by mandate of Rule 97 cannot materialize or be fabricated by innuendo from a totally silent record. While the opinion of the Court of Appeals fails to squarely address the issue, by implication of its holding to the facts of this case, the only principle that can be drawn from its opinion is that no ruling need appear of record. Thus a ruling by silence or implication is sufficient to satisfy the mandate of Rule 97 according to the Court of Appeals, but this violates the due process clauses of the 5th and 14th Amendments to the United States Constitution.

Were this Court to allow the Court of Appeals holding to stand, it would seriously undermine the policies underlying Rule 97 and the 5th and 14th amendments to the United States Constitution. The Colorado Supreme Court in addressing a matter concerning the same motion before the same judge as appears here held that the right of a party to a hearing before a fair and impartial tribunal is basic to our system of justice and therefore, not only the actuality of fairness but the appearance of fairness as well, must concern the courts. Therefore, Courts must meticulously avoid any appearance of partiality in order to maintain public confidence in judicial integrity.

The Court of Appeals decision here stands for the proposition that since Judge Perricone did not preside at a trial he must have disqualified himself, no prejudice was incurred by Mr. Busto. The fallacies with applying that type of rationale to

Rule 97 are several. First, perhaps Judge Perricone did not disqualify himelf but only had a scheduling conflict. Secondly, perhaps Judge Perricone did not disqualify himself but chose to pick an alternate Judge to keep from having to disqualify himself. Thirdly, if that line of reasoning is used in a situation such as this, where a motion for disqualification is filed against a judge and he doesn't rule on the motion but ultimately doesn't preside over subsequent proceedings, it must also be applied to a situation where a motion for disqualification is filed and the trial judge again doesn't rule on the motion but does preside over subsequent proceedings. In which case the moving party, attempts to bring an action to compel a ruling. The trial judge or opposing party need only reply that it can be implied from the fact that the trial judge still presides that a ruling denying the motion was entered or meant to be entered. That being the case, the moving party would have no means to attack or challenge the court's inaction or ruling. Lastly, it causes the parties to the action to be forced to play a wait and see game with the Courts. A party files his motion to disqualify and then is compelled to wait and see what happens. If the judge continues in the proceedings, you can assume he denied your motion; but if another judge appears at the next proceeding, you can assume he granted your motion. Such a procedure which the Court of Appeals in its ruling herein invites, is simply not conducive to fundamental notions of fair play and subsequential justice as has been held to be contained in the basic concept of due process of law. The Court by not openly dealing with a motion for disqualification leaves the motion pending and undetermined with the charge of bias and prejudice, even though unproven or defective, remaining as an accusation of unfitness by the Court. In doing so, the Court invites error and doubt resulting in public confidence and judicial integrity withering away in speculation and conjecture. The Court in allowing the procedure of the trial court in this case to go uncorrected sanctions such conduct and deprives Mr. Busto of due process of law. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

It is Petitioner's contention that the Court of Appeals should not have assumed as fact something which does not appear of record (the disqualification) and base its ruling thereon (no prejudice no error). See, Smith v. Davis, 45 S.E. 2d 237, 240 (Ga. App. 1947); 5 C.J.S. Appeal and Error § 1534 p. 1051. It has been held that failure to comply with the provision of a mandatory legal directive constitutes error per se and must be deemed to be prejudicial. Ferderer v. Northern Pacific Ry. Co., 26 N.W. 2d 236, 241 (N.D. 1947).

In the same context, arises the question of how did Judge Lilly come to preside over the trial. Rule 97 provides that "upon disqualifying himself, a judge shall notify forthwith the chief judge of the district who shall assign another judge from another district (Denver) not the first Judicial District." Was Judge Lilly assigned by the chief judge of the 1st Judicial District or was he assigned by or at Judge Perricone's request? A judge against whom a motion for disqualification is filed may not select his successor or assign the case to another judge. Aaberg v. District Court, 319 P.2d 491 (Colo. 1957).

It is the Petitioner's contention that the record presented to the Court of Appeals affirmatively showed error. The disregard of a mandatory legal directive should be held to constitute excess jurisdiction of the court, error per se and deemed to be prejudicial. See, Colorado Appellate Practice-Anatomy of an Appeal, p.41, CLE in Colo. 1982. The decision rendered by the Court of Appeals runs contra to the policies underlying Rule 97, as well as, due process of law.

Mr. Busto's Request For a Change of Judge was accompanied by an affidavit. Also included in the above mentioned request was a list of the names of all the attorneys Busto had tried to hire to represent him. As mentioned earlier, one of the hearings was held for the sole purpose of lifting the temporary injunction long enough to allow Martin to apply for a patent on the trade secret in question. Since a patent had been applied for at the time Busto made his Request For a Change of Judge,

which sould have, by law, stopped the proceedings until the matter had been ruled upon, there was no reason to expedite this case. Martin's rights were protected by applying for the patent. However, Mr. Busto's rights to a fair trial presided over by an impartial judge; a trial at which he was represented by counsel were violated by the fact that Judge Perricone did not call a halt to the proceedings, did not rule on the Request For a Change of Judge, and did, in fact, ignore the whole issue. Jefferson County District Court should have lost its jurisdiction when Martin applied for a Patent, as deciding an issue involving patents is within the jurisdiction of a special Federal Court.

The Court of Appeal's decision that this appeal is frivolous and the granting of Appellee's Motion for Rule 38(d) Sanctions is contra to decisions of the Colorado Supreme Court, as well as other Court of Appeal's decisions. It also denies the Petitioner due process of law and created an unwarranted chilling effect on his counsel's obligation to zealously represent him.

It is the Petitioner's contention that the Appeal was not frivolous. Petitioner's brief to the Court of Appeals, his Petition for Rehearing and Petition for Writ of Certiorari all represent a justifiable issue. While obviously the Court of Appeals was not convinced by Petitioner's legal proposition and argument, the Colorado Supreme Court has held the mere fact an appeal proves unsuccessful or advance a claim or defense not recognized under existing law is not ground for holding an appeal to be frivolous. Western United Realty, Inc. v. Isaacs, 82SC64, 14 Colo. Law. 939 (1984). Thus an appeal which presents an issue of first impression or advance novel theories of law, or good faith efforts to attempt to extend, modify or reverse existing law is meritorious enough to withstand allegations of frivolousness. Wyatt v. United Airlines, Inc. 638 P. 2d 812 (Colo. App. 1981); City of Imperial Beach v. Palm Ave. Book, Inc., 171 Cal. Rptr. 197, 200 (Cal. App. 1981). The record, when reviewed most favorable to the Petitioner, clearly fits in the above categories and as such should not have been held to be frivolous.

Even were this appeal to be frivolous, which Petitioner denies, the Court of Appeals award of damages in the nature of reasonable attorney's fees is directly contra to the Colorado Supreme Court's holding In Re the Marriage of Mann, 655 P. 2d 814 (Colo. 1982) and Division III of the Court of Appeals holding In Re the Marriage of Trask, 580 P. 2d 825 (Colo. App. 1978).

In Mann the Colorado Supreme Court after maintaining the appeal as frivolous refused to award appellee attorney's fees because she failed to specify an amount of damages in her motion. The rule 38(d) motion filed by Martin herein likewise failed to state any amount of damages. The Colorado Supreme Court's decision in Mann is in conformity with the Court of Appeal's decision in Trask, when the Court of Appeals granted attorney's fees pursuant to C.A.R. 38 because a specific amount was requested and supported by an accompanying affidavit.

A motion pursuant to C.A.R. 38(d) alleging a frivolous appeal and filed approximately 16 months after the appeal is filed but only 17 days before scheduled oral argument and to which Petitioner had only one minute to respond to does not provide Petitioner with adequate notice and opportunity to be heard by due process of law. Such a situation is contra to the Colorado Supreme Court's holding that before an Appellant could be charged with damages pursuant to C.A.R. 38(d), he must be given adequate notice and opportunity to be heard. Seven days notice when Appellee has 16 months to file its motion is not sufficient notice. Additionally, one minute in which to respond to the allegation of frivolousness and claim of damages can hardly be held to rise to an opportunity to be heard. The Court's request for oral argument on the merits of the motion constitutes total surprise to the Petitioner and his counsel of record at the time and is contra to Rule 27(e).

The Court of Appeals has denied the Petitioner's due process of law in holding him accountable for a standard that was vague. The Colorado Supreme Court has held that the standard of determining frivolousness prior to International

Technical Instruments, Inc. v. Engineering Measurements Co., 12 Colo. Law 1683 (Colo. App. 1983), were vague. This appeal and corresponding briefs were filed prior to International. Therefore, Petitioner was not adequately apprised of what constituted a frivolous appeal and cannot subsequently be penalized for committing a wrong he was not adequately apprised of at the time. If the standards were vague, the Petitioner cannot be held accountable for not complying with or violating them. To do so denies the Petitioner due process of law.

CONCLUSION

For all the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted, thereby allowing this Court to correct the manifest error in the trial court, and fulfill the "due process" guarantees of the Fifth and the Fourteenth Amendments to the United States Constitution.

JERRY T. BUSTO, PETITIONER-PRO-SE
790 Depew Street
Lakewood, Colorado 80214
(303) 237-1062 or 237-9373

MARTIN MARIETTA,
a Maryland Corporation
Respondent,

versus

JERRY T. BUSTO
Petitioner

AFFIDAVIT OF SERVICE

I, JERRY T. BUSTO, PETITIONER PRO-SE, being of lawful age, and after having been first duly sworn upon oath, depose and state:

1. That on the 25 th day of February, 1985, I served three copies of The Petition for Writ of Certiorari which is attached hereto on all parties required to be served under Rule 28 of the United States Supreme Court, as follows:

John R. Webb, attorney for Martin Marietta Corporation, at Holme Roberts & Owen, 1700 Broadway, Suite 1800, Denver, Colorado 80290.

Jerry T. Busto

Jerry T. Busto, Petitioner-Pro-Se

Subscribed and sworn to before me this 27 th day of February, 1985.

My commission expires: Oct. 1, 1987

Notary Public

BEST AVAILABLE COPY

APPENDIX "A"

No. 82CA0892

MARTIN MARIETTA, a Maryland corporation,
Plaintiff-Appellee,

v.

JERRY T. BUSTO,
Defendant-Appellant

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge
Honorable Joseph N. Lilly, Judge

DIVISION II
Opinion by
JUDGE VAN CISE
Smith and Berman, JJ., concur

JUDGMENT AFFIRMED
AND CAUSE REMANDED
WITH DIRECTIONS

Holme Roberts & Owen
John R. Webb
Elaine A. Truitt
Denver, Colorado

Attorneys for Plaintiff-Appellee

Thomas W. Koelling
Colorado Springs, Colorado

Attorney for Defendant-Appellant

In this action premised upon violation of plaintiff's trade secrets, defendant Jerry T. Busto, appeals a judgment in favor of plaintiff, Martin Marietta Corporation, granting it an injunction and a declaratory judgment and dismissing defendant's counterclaim. We affirm.

The only claims of error raised on appeal pertain to alleged "irregularities in the proceedings." Thus, it is unnecessary to relate the facts pertaining to the subject matter of the lawsuit.

I. "Irregularities" Alleged by Defendant

A.

Under the circumstances of this case, the trial court did not abuse its discretion in denying defendant's request for a continuance on the basis of lack of counsel. Nearly six months before trial date, in open court, defendant consented to his former counsel's withdrawal. He was advised by the court at that time and subsequently that it was up to him to obtain counsel and that a continuance would not be granted for lack of counsel.

B.

The technical error, if any, in not specifically ruling on defendant's motion for change of judge, filed less than 10 days before trial date, was rendered harmless when the original judge (Judge Perricone) disqualified himself and another judge (Judge Lilly) was appointed and presided over all subsequent proceedings, including the trial to the court and post-judgment matters.

C.

There was no error in the trial court's vacating its prior order denying defendant's motion for a new trial when, as here, the motion to vacate was made in a timely fashion. Ranger

Insurance Co. v. District Court, 647 P.2d 1229 (Colo. 1982). In its "findings of fact, conclusions of law and judgment," the court had specifically reserved the issue of recoverability of plaintiff's attorney's fees. Until this matter was determined, the judgment was not final or appealable. Ortega v. Board of County Commissioners, 657 P.2d 989 (Colo. App. 1982). And, until the judgment became final, the trial court retained jurisdiction.

D.

At the time of the post-trial hearing on costs and attorney's fees, a new attorney entered his appearance for defendant. At that time he asked leave to withdraw the original new trial motion so he could make amendments thereto. The request was denied.

Review of this claimed error is precluded because no statement or offer was made as to what additional grounds the new counsel intended to raise and no amended motion was ever offered. See Larsen v. Archdiocese of Denver, 631 P.2d 1163 (Colo. App. 1981). We are unable from this record to determine whether the claimed error was prejudicial. Therefore, error, if any, was harmless.

II. Plaintiff's "Motion for Sanctions"

Seven days before oral argument, plaintiff's attorney filed with this court and served on opposing counsel a "motion for sanctions." In the motion, it asked this court, pursuant to C.A.R. 38(d), to award double costs and, as damages, its attorney's fees incurred on this appeal, on the basis that this appeal is frivolous. The parties were advised by this court to be prepared to argue the merits of this motion at the scheduled oral argument on the appeal. The matter was argued by both parties.

From our review of the record, the arguments of counsel, and our own research, we find that the defendant was unable to present any rational argument based on the evidence or law in support of his claims of error on this appeal. Therefore, we conclude that the appeal was and is frivolous. See Western United Realty, Inc. v. Isaacs, —P.2d— (Colo. No. 82SC64, March 26, 1984), and Mission Denver Co. v. Pierson 674 P.2d 363 (Colo. 1984).

The judgment is affirmed, and plaintiff shall recover double costs. The cause is remanded with directions to conduct a hearing to determine the C.A.R. 38(d) damages, including the amount of a reasonable fee for plaintiff's attorneys on this appeal, see Rogers v. Charnes, 656 P.2d 1322 (Colo. App. 1982), and to enter judgment accordingly.

JUDGE SMITH and JUDGE BERMAN concur.

APPENDIX "B"

IN THE COURT OF APPEALS
OF THE STATE OF COLORADO

Case Number 82 CA 0892

MARTIN-MARIETTA, a Maryland corporation,	)	
Plaintiff-Appellee	)	
vs.	)	ORDER
JERRY T. BUSTO, Defendant-Appellant	)	

Upon consideration of the Petition for Rehearing filed by the appellant herein, said Petition is hereby denied. Unless otherwise ordered, mandate shall issue 6-14-84.

BY THE COURT,

DATED: 6-7-84

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

APPENDIX "C"

SUPREME COURT, STATE OF COLORADO
CASE NO. 84SC252
CERTIORARI TO THE
COLORADO COURT OF APPEALS, 82CA0892

ORDER OF COURT

JERRY T. BUSTO,
Petitioner(s)

vs.

MARTIN-MARIETTA, a Maryland corporation,
Respondent(s).

Upon consideraton of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of the Court of Appeals,

It Is This Day Ordered that said Petition for Writ of Certiorari shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, November 26, 1984.
JUSTICE QUINN does not participate.

cc: Mac V. Danford, Clerk
Colorado Court of Appeals

THOMAS W. KOELLING, ESQ.
1112 North Wahsatch Avenue
Colorado Springs, Co. 80903

HOLME ROBERTS & OWEN
John R. Webb, Esq.
1700 Broadway, Ste 1800
Denver, Co. 80290

APPENDIX "D"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF JEFFERSON
STATE OF COLORADO
Civil Action No. 80-CV-3763
Division 2

MARTIN MARIETTA CORPORATION, Plaintiff,	)	
vs.	)	REQUEST FOR ASSIGNMENT OF CASE TO
JERRY T. BUSTO Defendant.	)	A DIFFERENT JUDGE

COMES NOW the Defendant, in propria persona, and, pursuant to C.R.C.P. Rule 97, respectfully moves that the judge in the above titled case, the Honorable Gaspar F. Perricone, disqualify himself and assign this case to a different judge.

1. The record in this case indecates *(sic)* that the Honorable Gaspar F. Perricone has shown a large measure of favoritism toward the Plaintiff, and that such action has been to the detriment of the Defendant.

2. The Court allowed the Defendant's former attorney of record in this case, Mr. John G. Taussig, Jr., to withdraw as council *(sic)* for the Defendant without a hearing or inquiry into the reasons for the withdrawl *(sic)*, and without inquiry as to whether the Defendant had obtained other council *(sic)*. Defendant was given no notice of the pending withdrawl *(sic)*, which was presented in a motion to this court at an emergency hearing held on December 11, 1982. Defendant was given no advice by the Court as to his rights concerning the withdrawl *(sic)* of his attorney. This action left the Defendant with no

other option but to proceed pro-se. The Defendant was thus deprived of representation, and not being an attorney himself, cannot properly represent himself before the court. Defendant has not been able to obtain other council *(sic)*, although he has made numerous efforts to do so. Defendant has tried, in vain, to obtain the following council *(sic)* to represent him in this case; Jerry Spence, Joseph Branney, Paul Baca, Leo Gemma, Scott Robinson, Elizabeth Meyer, and Jim Kissel. Each of these attorneys hase *(sic)* declined either because of the short notice of such a complex case, or because of prior commitments.

3. The Court has, on numerous occasions, refused to assist the Defendant in the mechanics of preparing and presenting his case although the Defendant has requested such assistance. Defendant believed in good faith that he was entitled to such assistance because of the fact that he is without council *(sic)* through no fault of his own.

4. The Court has, on numerous occasions, held in-camera conferences of which no record has been made, even though the making of transcripts was requested by Defendant. At these sessions the Defendant has been denied the opportunity to speak by the Court, and favoritism and assistance was afforded to the Plaintiff by the Court.

5. The Court has been made aware of the fact that the Defendant is a friend and former associate of John M. Mann, the appellant in case No. 81SA410, presently before the Colorado Supreme Court, such appeal having been taken from the Permanent Orders issued by the Honorable Gaspar F. Perricone in Jefferson County District Court, Case No 78D1404. The Defendant has read the Briefs filed in Mr. Mann's appeal and notes that the allegations of bias and prejudice raised by Mr. Mann to the actions of Judge Perricone in 78D1404 are similar to those raised by the Defendant herein. This Court learned of the connection when Defendant came in to pay for Mr. Mann's copy of the transcript in his case, since Mr. Mann was out of town and could not come himself. Defendant discussed his friendship and relationship to Mr. Mann at that time with Judge Perricone's secretary, Charlene. Since that time this Court has overtly evidenced toward the Defendant, similar types of bias and prejudice as complained of by Mr. Mann in his appeal.

Judge Perricone's secretary, Charlene. Since that time this Court has overtly evidenced toward the Defendant, similar types of bias and prejudice as complained of by Mr. Mann in his appeal.

6. Judge Perricone exhibited extreme favoritism for the Plaintiff and prejudice against the Defendant when he denied Defendant's motion to supress *(sic)* the file stating that the surest way to get the press interested was to supress *(sic)* a file, and then turning right around and supressing *(sic)* parts of the file upon request by the Plaintiff. The Court could have advised the Defendant that it would have been proper to supress *(sic)* only those parts of the file which contained the very secret subject technology involved in this case. The Court was well aware of the need for secrecy as Judge Perricone, himself had ordered that the depositions of witnesses containing the subject technology be delivered to the Court under lock and key and be kept supressed *(sic)*. When Defendant requested that the Court supress *(sic)* the file to protect the secret, after learning that it was open to the gereral *(sic)* public, he was dismissed by the Court. Even after Plaintiff had assured the Defendant, and the Court that their para-legal staff had gone through the file and removed all mention of the subject technology, Defendant discovered that mention of the subject technology and the actual subject technology itself was still in the open file.

7. Judge Perricone is aware that the Defendant is still without council *(sic)*, through no fault of his own, and yet at an in-camera pre-trial conference held on June 11, 1982, Judge Perricone declared that their *(sic)* will be no continuences *(sic)* in this case. It is impossible for Defendant to obtain council *(sic)* in time to properly defend him in this case by the trial date of July 6, 1982.

8. Pursuant to the foregoing, the Defendant believes that he has been denied due process of law and that it will be impossible for him to receive a fair and impartial trial from the Honorable Gaspar F. Perricone.

Defendant has attached his affidavit to the Court as required by C.R.C.P. Rule 97.

WHEREUPON, Defendant prays that this Honorable Court grant an order to disqualify the Honorable Gaspar F. Perricone from sitting in this case and reassign this case to a different judge.

JERRY T. BUSTO, Defendant Pro-se
790 Depew Street
Lakewood, Colo. 80214
237-1062

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF JEFFERSON
STATE OF COLORADO
Civil Action No. 80-CV-3763
Division 2

MARTIN MARIETTA CORPORATION Plaintiff,	)
vs.	)AFFIDAVIT OF)JERRY T. BUSTO
JERRY T. BUSTO Defendant.	)

I, Jerry T. Busto, being of legal age and being duly sworn, do swear under oath as follows:

1. I am the Defendant in the above titled case.

2. I am presently without council *(sic)* and am appearing pro-se in the above titled case due to the court allowing my attorney to withdraw without proper consideration for me and my situation.

3. I have requested the assistance of the Court in preparing and presenting my case, and such assistance has been denied me. It is my belief that the Court is obligated to provide such assistance as I am not an attorney nor have I been able to obtain an attorney to represent me in the above titled case. Such denial of assistance is, I believe manifestly unfair and amounts to denial of due process.

4. The Honorable Gaspar F. Perricone has evidenced bias and prejudice toward me and simultaneously shown favoritism toward the Plaintiff by denying me transcripts, continuences *(sic)*, and assistance, and by offering the Plaintiff advise *(sic)* as to procedure and option.

5. The Honorable Gaspar F. Perricone harbors bias and prejudice against me due to my association with John M. Mann, an individual against whom Judge Perricone has an intence *(sic)* dislike as evidenced by the contents of M. Mann's trial and appeal records in cases no. 78 D 1404 (Jefferson County) and 81SA410 (Colorado State Supreme Court).

6. I believe that I cannot obtain a fair and impartial trial from Judge Perricone as evidenced by the forgoing *(sic)*.

_____

Jerry T. Busto

I declare that I have read the foregoing affidavit and the statements contained therein are true to the best of my know-

ledge and belief. I further declare that I have read the REQUEST FOR ASSIGNMENT OF CASE TO A DIFFERENT JUDGE to which this affidavit is attached, and it is by me and the statements contained therein are true and correct to the best of my knowledge and belief.

_____

Jerry T. Busto

SUBSCRIBED AND SWORN to before me this____ day of _____, 1982 by Jerry T. Busto.

_____

Notary Public
(Seal)

My commission expires: _____

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the REQUEST FOR ASSIGNMENT OF CASE TO A DIFFERENT JUDGE and the AFFIDAVIT OF JERRY T. BUSTO was deposited in the United States Mail, postage prepaid, on this____ day of , 1982, addressed to the following.

John R. Webb
1700 Broadway
Denver, Colorado 80209

_____

Marla J. Busto

APPENDIX "E"

DISTRICT COURT
COUNTY OF JEFFERSON
STATE OF COLORADO

Case No. 80-CV-3763

REPORTER'S TRANSCRIPT

MARTIN MARIETTA CORPORATION,

Plaintiff,

v.

JERRY T. BUSTO,

Defendant.

The Trial in this matter commenced on Tuesday, July 6, 1982, before the HONORABLE JOSEPH LILLY, Judge of the District Court.

FOR THE PLAINTIFF: JOHN R. WEBB (#1876)

FOR THE DEFENDANT: PRO SE JERRY T. BUSTO

INDEX

WITNESSES:

For the Plaintiff:	DIRECT	CROSS	REDIRECT	RECROSS
Stanley Sawicki	17			
Morris McLain	20			
Robert E. Burnett	23			
Mohan S. Misra	28			
Dr. David Leroy Olson	61			
Philip DeArment	73			

EXHIBITS:

For the Plaintiff:	Identified	Offered	Accepted
1. 1957 Patent Agreement	16-15	16-15	17-10
2. 1977 Patent Agreement	17-2	17-7	17-10
3. Mr. Busto's Affidavit	17-4	17-7	17-10
4. Policies — 3 pgs. 3-19-56	19-9	10-5	10-9
5. Articles and Plans of Martin Marietta	22-2	22-13	22-16
6. J.T. Busto employment history - 3 pgs.	24-10	24-18	24-21
7. Job description	26-19	27-6	27-12
8. Misra's Proposal	38-7	38-14	38-23
9. Permission Document	46-8	46-16	46-20
10. Chemical Sales Purchase	47-5	47-23	

EXHIBITS (continued)

For the Plaintiff:	Identified	Offered	Accepted
11. Chemical Sales Billing	47-9	47-23	
12. Denver Aerospace Purchase	48-18	49-14	49-15
13. Bennett & Assoc Biling *(sic)*	49-4	49-14	49-15
14. Misra's handwritten Instructions	53-13	53-29	53-23
15. Final Report	58-6	58-13	58-21
16. Professional Qualifica-cations of Dr. Olson	62-16	62-20	62-23
17. Dr. Olson's Drawing	68-15	68-23	71-5
18. Mr. Busto's Memo to DeArment	74-24	75-19	75-20
19. Letter DeArment to Jerry Busto (copy)	76-24	76-21	77-7
20. John Taussic's letter	78-21	80-13	80-15
21. Complaint-Boulder	78-23	80-14	80-15

PLAINTIFF'S CLOSING ARGUMENT WAIVED on page 83-23

DEFENDANT'S CLOSING ARGUMENT WAIVED on page 84-1

FINDINGS OF THE COURT: Page 84

PROCEEDINGS

(Whereupon Court convened at 9:00 a.m.)

THE COURT: 80--CV-3763, Martin Marietta versus Jerry T. Busto.

MR. WEBB: John R. Webb of Holme Roberts & Owen and Morris McLain who is in-house counsel with Martin Marietta. We are ready to proceed.

THE COURT: All right. Do you have 9:00 on your watch?

MR. WEBB: Yes, Your Honor.

THE COURT: Is Mr. Busto in the courtroom? I want to take one precaution. I want to call Judge Perricone's division and make sure he isn't down there. Would you do that and I'll remain in attendance while you make the phone call. Just go to the clerk's office and do it.

You are Mr. McLain?

MR. MCLAIN: M-c-L-a-i-n.

THE COURT: All right. How do you spell DeArment?

MR. MCLAIN: D-e-a-r-m-e-n-t.

THE COURT: You're Mr. Busto?

MR. BUSTO: Yes, Your Honor.

THE COURT: Tell Mr. Webb he's here. He's here, Mr. Webb I just called the case. Are you ready for trial?

MR. BUSTO: Yes, Your Honor.

THE COURT: Mr. Busto, I want to get one thing on the record. I understand that you have been advised since you are pro se counsel, you're going to--you have to play by the rules of evidence and procedure. You understand that, don't you?

MR. BUSTO: Okay, Your Honor. I want to object to the proceedings this morning because I do not have counsel.

THE COURT: Objection overruled. Your request for a continuance is already passed on and you have assignment to a different judge as you requested. So, we are ready to proceed.

MR. BUSTO: May I present a motion for new trial.

THE COURT: Well, we haven't had a trial yet. You can't have a new trial until you have had one trial. You haven't had one trial. You can't have a motion to new trial until you've had the first one. That is what you are talking about is motion for new trial?

MR. BUSTO: I want to appeal.

THE COURT: There is nothing to appeal from yet. There hasn't been a ruling in this case. You can't appeal until you've had a ruling in this case unless you want to appeal for something that already happened.

MR. BUSTO: Your Honor, I can't anticipate because I don't know what to do.

THE COURT: Well, that's not my problem. Mr. Busto, you had an opportunity to get counsel. This case has been pending a long time. You were told no further continuance. So, I have no choice but to proceed. Those matters were already resolved prior to my getting into the case. So, I'm ready to try it. You may make an opening statement.--

MR. BUSTO: Your Honor,--

THE COURT: --What do you want to say for the record?

MR. BUSTO: May I note my objection?

THE COURT: You will have a continuing objection in this trial. Everything that we are doing, you can object to.

MR. BUSTO: Thank you.

THE COURT: Show that your objection is on the record. If you have something specific that you want to say, don't hesitate to rise and call it to the Court's attention.

MR. BUSTO: Thank you.

THE COURT: We want to protect yourself as much as we can. I can't try the case. I'm not your lawyer. I notice in one instance you made reference to Judge Perricone wouldn't help you prepare your case. The Judge's function is to resolve the dispute. As far as preparing the case, you have to do it yourself or get yourself counsel. I want you to understand my position. I can't help you try your lawsuit.

You may make an opening statement, Mr. Webb.

MR. WEBB: I have two preliminary matters. I would tender to the Court a ring-binder of exhibits previously marked. These are unofficial reference for the Court's reference. I also tender to the Court a copy of Conclusion of Law and Judgement *(sic)* which at the conclusion of the evidence we ask that the Court enter.

THE COURT: All right. We will enter that later. Now, you understand he is going to make an opening statement. He's going to tell us what his case is about. You'll have the same opportunity to make an opening statement and tell the Court what your case is. Do you understand that?

MR. BUSTO: Yes.

THE COURT: All right.

MR. WEBB: Your Honor, the differences in this case will deal with a problem unique and important to the steel industry, unknown methods of manufacturing steel involving the lowering of the large graphite electrodes, perhaps six foot in diameter in length, to iron ore and other components that become steel. By passing electric current, intense heat is created and the steel manufacturing process occurs.

There is, however, a cost to this process. Because of the intense heat, the graphite in the electrode is burned up, or as the expert witnesses may call it oxidized, depending on the efficiency of the steel mill. The mere process of burning up the graphite electrode can add as much as $15 a ton to the cost of steel manufacturing

This must be viewed as against the annual steel production in the United States of 30 to 40 million tons.

Evidence before the Court will deal with an invention. And before I go into detail on that, Your Honor, I would ask that the Court rule that the record in this case should be sealed and that persons other than those associated with the litigants be excluded from the courtroom. And the three gentlemen and the lady on my right are all employees of Martin Marietta Corporation.

THE COURT: Anybody else in the courtroom who is not?

MR. WEBB: Not that I can determine, Your Honor.

THE COURT: The motion is granted. The record is sealed. There is nothing anyway up to now disclosing a trade secret as far as the pleadings are concerned.

MR. WEBB: That is our concern, Your Honor.

THE COURT: The transcript is ordered sealed and the record of this proceeding is ordered sealed. And you keep an eye for any witnesses not supposed to be in the courtroom.

THE COURT: Well, I'm not letter perfect either. It's not important at this time. Go ahead.

MR. WEBB: Mr. Busto worked in various positions with Martin Marietta Corporation between 1957 and 1977. During that time, he made some discoveries which he voluntarily turned over to Martin Marietta and for which he received small awards.

In 1977, Mr. Busto signed a second agreement which likewise provided among other things that any discoveries made by him would be property of his employer. By this time, 1977, Mr. Busto was working as a laboratory technician performing quite sophisticated tests. After he signed the 1977 agreement, he continued working as a laboratory technician until December of 1978 at which time he became involved in the technology that's subject of this lawsuit.

Changing the focus for just a moment to Misra, who is a native of the country of India now a citizen of the United States. He holds graduate degrees in manufacturing and metalurgy *(sic)*. Mr. Misra joined Martin Marietta Corporation in 1975. Moving forward to approximately the summer of 1978, Mr. Misra was approached--

THE COURT: Who is the gentleman in the back of the courtroom?

MR. WEBB: I don't know, Your Honor.

THE COURT: Are you a witness?

UNIDENTIFIED SPEAKER: No.

THE COURT: Sorry, we will have to excuse you. This involves technical matters and trade secrets. You won't be permitted to stay.

UNIDENTIFIED SPEAKER: I was told differently the other day by the Judge.

THE COURT: I didn't hear you.

UNIDENTIFIED SPEAKER: I was told differently the other day by the Judge.